Supreme Court, U.S.
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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, directly contrary to the holding of every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Circuit City Stores, Inc. v. Adams,* 194 F.3d 1070 (9th Cir. 1999), reprinted in the Joint Appendix ("J.A.") at pages 53 through 56. The Order of the United States District Court for the Northern District of California is unpublished, and reprinted in the Joint Appendix. J.A. at 43-52.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1999. The petition for a writ of certiorari was filed on February 16, 2000. The petition for a writ of certiorari was granted, limited to Question 1 presented by the petition, on May 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> *§ 1* "[C]ommerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> *§ 3* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

> *§ 4* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

9 U.S.C. §§ 1 - 4 (1994).

STATEMENT OF THE CASE

A. Factual Background.

In its 1991 landmark decision, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that a claim asserted by an employee against his employer under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, can be subjected to compulsory arbitration pursuant to an arbitration agreement. Relying on *Gilmer* and the Court's other rulings establishing a strong federal presumption of arbitrability under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 *et seq.*, employers throughout the country began to explore the advantages to employers and employees alike of entering into predispute agreements to arbitrate, rather than litigate, the claims or controversies that might arise between them. In designing their arbitration programs, responsible employers sought to draw the proper balance between the increased efficiencies of arbitration (which benefit both parties) and the requirement that arbitration programs allow

participants to vindicate effectively their statutory rights.

Circuit City is a national retailer of brand-name consumer electronics and related products. In March 1995, the company implemented an Associate Issue Resolution Program, consisting of an enhanced "open door" policy promoting increased communication between Circuit City employees and managers, as well as a program of final and binding arbitration of all employment-related legal disputes. Those individuals who were employed at the time the program was introduced in March of 1995 were given the opportunity to "opt-out" of the arbitration component of the program if they so desired. *See Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for certiorari filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000).

At all times subsequent to the March 1995 implementation of the program, individuals seeking employment with Circuit City have been presented, as part of the job application process, with the Circuit City Dispute Resolution Agreement ("DRA"). An individual who executes the DRA agrees to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, **exclusively** by final and binding **arbitration** before a neutral Arbitrator." (J.A. at 13) (emphasis in original). Only those individuals who have signed the DRA, agreeing to be bound by its terms, may have their application for employment considered by Circuit City. (J.A. at 12.) A prospective applicant who executes the DRA but then changes his mind within three days may withdraw from the agreement to arbitrate by notifying Circuit City that he is withdrawing his application for employment. (J.A. at 14.)

The DRA provides that "neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of

employment between Circuit City and me." (J.A. at 13.)[1] The obligation to arbitrate exists independently of the employment relationship and applies before, during and after the employment relationship. (J.A. at 13.) The DRA is a separate, stand-alone agreement between the prospective applicant and Circuit City, entered into as part of the application process.

Saint Clair Adams ("Adams" or "Respondent") entered into an agreement with Circuit City to arbitrate any and all employment-related legal claims on October 23, 1995, when he executed the DRA and submitted it with his application for employment. (J.A. at 12-13.) Circuit City agreed to be bound by the DRA, as reflected by the signature of a Senior Vice President of the company. (J.A. at 14.) Adams did not withdraw his consent to the DRA. (J.A. at 11.) In November 1995, Adams was hired by Circuit City as a sales counselor in Circuit City's Santa Rosa store, selling merchandise in the store's "home/office" department. (Ninth Circuit Excerpts of Record ("E.R.") at 4-13; J.A. at 40.) Adams was employed by Circuit City in that capacity until he resigned his employment on November 30, 1996.

B. Proceedings Below.

On November 26, 1997, Adams sued Circuit City in a California Superior Court for a variety of employment-related legal claims. (E.R. at 4-13.) On December 5, 1997, Adams also sought arbitration, submitting to Circuit City an Arbitration Request Form that described the dispute he wished to have decided by an arbitrator in the same terms as the causes of action contained in his lawsuit. (J.A. at 40.) The Arbitration Request Form confirmed, post-dispute, Adams' agreement to resolve this dispute by arbitration.

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[1] The Dispute Resolution Rules and Procedures contain the rules and procedures governing the parties' agreement to arbitrate. (J.A. at 19-28.)

(J.A. at 40.) ("I hereby submit the above-described suit for arbitration. I agree to accept the decision and award of the Arbitrator as final and binding as to all claims related to my employment relationship with Circuit City. . ."). He subsequently filed an amended complaint in his lawsuit on January 21, 1998, incorporating a request for declaratory relief with respect to his rights and obligations pursuant to the DRA.[2] (E.R. at 14.)

Pursuant to §§ 3 and 4 of the FAA and 28 U.S.C. § 1332, Circuit City filed a Petition to Stay State Court Action and to Compel Arbitration in the United States District Court for the Northern District of California ("Petition") (Ninth Circuit Supplemental Excerpts of Record 1-30.) On May 1, 1998, the District Court granted the Petition and entered an Order Staying State Court Action and Compelling Arbitration. (J.A. at 43-52.) Adams appealed the District Court's Order to the United States Court of Appeals for the Ninth Circuit. (E.R. at 100.)

The Ninth Circuit found that the FAA was inapplicable to this case. To reach this conclusion, the Court first restated its decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), in which the Court held, contrary to every other federal Court of Appeals, that the exclusion found in § 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign and interstate commerce," 9 U.S.C. § 1, must be read to exclude from the coverage of the FAA all contracts of employment. *See Adams*, 194 F.3d at 1071-72, *citing Craft*, 177 F.3d at 1094).

The Ninth Circuit then concluded that because the DRA was a condition precedent to Adams' employment, the DRA

[2] Specifically, Adams sought a court order that the DRA, which he acknowledged signing, was not enforceable against him on various legal grounds. Notably, he did not challenge the applicability of the FAA to the agreement.

was an employment contract. The Court reached this conclusion notwithstanding the specific disclaimer in the DRA to the contrary. *Adams*, 194 F.3d at 1071. Having concluded that the DRA was an employment contract, and in reliance upon the *Craft* holding that the FAA is inapplicable to all employment contracts, the Ninth Circuit reversed the district court's order compelling arbitration and remanded the case for dismissal because of a lack of federal authority. *Id.* at 1072. Circuit City filed a timely petition for a writ of certiorari, seeking review of two issues. *See* Pet. i. On May 22, 2000, this Court granted Circuit City's petition, limited to the first question presented.[3]

SUMMARY OF ARGUMENT

The Federal Arbitration Act was originally enacted in 1925, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by the American courts, and to place arbitration agreements upon the same footing as other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Its provisions manifest a liberal federal policy favoring

[3] In the second part of its petition for certiorari, Circuit City renewed its argument that because respondent's arbitration agreement was executed as part of the employment application process, it is not a "contract[] of employment" within the meaning of § 1 of the FAA. Though this Court's grant of certiorari was limited to the first question presented, Circuit City has not waived this point. As emphasized in the brief amicus curiae filed by the Society for Human Resource Management, the Ninth Circuit's view that virtually any agreement between an employer and employee is covered by § 1 would render the FAA inapplicable to arbitration provisions in a whole host of ancillary agreements between employers and employees, such as stock option and non-compete agreements, which unquestionably are not employment contracts.

arbitration agreements. *Id.*

Section 1 of the FAA provides that "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Beginning nearly a half century ago, with *Tenney Engineering, Inc. v. United Electrical and Machine Workers of America*, 207 F.2d 450 (3rd Cir. 1953) (en banc), eleven federal Courts of Appeals construed § 1's exclusion narrowly, finding it applicable only to contracts of employment of those workers who are actually engaged in the movement of goods in interstate commerce. In *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), however, the United States Court of Appeals for the Ninth Circuit interpreted this language in § 1 of the FAA broadly, as excluding from the FAA's provisions all labor or employment contracts. In the case now before this Court, the Ninth Circuit reaffirmed and expanded the holding in *Craft*. The Ninth Circuit concluded that an agreement to arbitrate disputes, executed as a condition precedent to employment, was an employment contract, and that the FAA was therefore inapplicable.

In *Craft*, the Ninth Circuit failed to apply the well-established canon of statutory construction that courts should avoid a reading of statutory language which renders some words altogether redundant, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995), and the rule of *ejusdem generis*. The former is applicable because, as one Court of Appeals noted, "[I]t is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance. A broad exclusion of all employment contracts could simply have said 'nothing herein shall apply to contracts of employment." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-71 (1997) (Edwards, C.J.) (citations omitted). The latter canon provides that in the construction of a statute containing a list of items, general terms which follow specific terms should

be limited to matters which are similar to those specified. *Gooch v. United States*, 297 U.S. 124, 128 (1936). Thus, in § 1, where "any other class of workers engaged in foreign or interstate commerce" follows "seamen [and] railroad employees," the exclusion provided by the latter phrase is applicable to only those classes of workers who are engaged in foreign or interstate commerce "in the same way that seamen and railroad workers are." *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995).

The Ninth Circuit explained its holding by reference to the intentions of Congress at the time that the FAA "was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930's." *Craft*, 177 F.3d at 1086. However, the Ninth Circuit's recitation of legislative history was selective and incomplete. *See Asplundh Tree* at 596-601. Furthermore, the Ninth Circuit disregarded subsequent indicia of congressional intent: the reenactment of the FAA in 1947; the presumption that employers and employees may enter into arbitration agreements implicit in the congressional encouragement of alternative means of dispute resolution (including arbitration) provided in the Civil Rights Act of 1991; and the failure of numerous efforts in Congress since *Gilmer* to amend various employment discrimination statutes so as to prohibit the enforcement of arbitration agreements as to claims arising thereunder.

The narrow construction of FAA § 1, advanced by petitioner and adopted by all of the other Courts of Appeals, is consistent with the liberal federal policy favoring arbitration. That interpretation of the FAA by the other Courts of Appeals was acknowledged, although not addressed, by this Court in *Gilmer*, 500 U.S. at 25 n. 2. The courts and Congress have relied upon that uniform construction of the statute, as has petitioner. As demonstrated through the views expressed by numerous amici in support of petitioner's position, the nation's

business community similarly has relied upon this construction of § 1, and thus the applicability of the FAA to agreements to arbitrate employment disputes throughout the country.

The petitioner, Circuit City, respectfully asks that this Court reverse the ruling of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. THE FAA § 1 EXCLUSION REACHES ONLY SEAMEN, RAILROAD EMPLOYEES, AND OTHER WORKERS ALSO DIRECTLY ENGAGED IN THE INTERSTATE TRANSPORTATION OF GOODS IN COMMERCE.

By enacting the FAA, Congress codified a strong federal public policy favoring arbitration of disputes. *See* 9 U.S.C. §§ 1-16) (1994). Section 1 of the FAA contains a statutory exclusion which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Ninth Circuit held in *Craft*, and again in this case, that this language excludes from the coverage of the Act all contracts of employment – that it reads, in effect, "Nothing herein shall apply to contracts of employment." That reading, however, cannot be squared with the statutory text.

The Ninth Circuit in *Craft* relies heavily upon § 2 of the FAA, which sets out the Act's affirmative coverage by making enforceable any written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. This Court has construed § 2's commerce language broadly to reach to the limits of Congress' Commerce Clause authority. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). In *Craft* and, by implication, in this case, the Ninth Circuit held that the reference to commerce in § 2's coverage provision should be

read as coextensive with the reference to commerce in § 1's exclusion of employment contracts. Accepting that premise, the logical conclusion would be that the § 1 exclusion also must reach to the limits of the Commerce Clause and hence to all employment contracts. *See Craft*, 177 F.3d at 1087-88, 1091-93.

That conclusion fails, however, because it is based on a faulty premise. The term "commerce" must be understood by its context. This Court's prior decisions establish that the words modifying the term "commerce" within a statute are critical to understanding its meaning. When a federal statute refers to people and/or things *engaged in* commerce, the statute refers to something less than all people and/or things *involving* commerce. Thus, the proper question for decision here is which subcategory of employment contracts Congress intended to exclude from the FAA when it excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce." The answer lies in the statutory language itself: the subcategory excluded is the employment contracts of all workers who are "engaged in commerce" in the same way that seamen and railroad employees are, i.e., those workers directly engaged in the interstate transportation of goods. Every other federal Court of Appeals correctly has reached this same conclusion.[4]

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[4] *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of [FAA] Section 1."); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels

A. The Term "Engaged in Commerce" As Used In § 1 Is Narrower Than The Term "Involving Commerce" As Used In § 2.

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of commerce itself."), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers. . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA § 1 exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA excludes from the FAA only the employment contracts of workers engaged in the transportation of goods in commerce."). The Federal Circuit, because of its specialized and limited jurisdiction, has had no occasion to address this issue.

1. Just last Term, this Court reaffirmed the fundamental proposition that in a federal statute regulating interstate commerce, any words modifying the term "commerce" are critical to interpreting the precise scope of the statute. *See Jones v. United States*, 120 S. Ct. 1904, 1909 (2000). At issue in *Jones* was a federal arson statute covering property "*used in* interstate or foreign commerce or in any activity *affecting* interstate or foreign commerce." 18 U.S.C. § 844(i) (Supp. IV 1998) (emphasis added). Focusing on the latter phrase "affecting . . . commerce," the government argued that the statute reached all property subject to federal regulation under the Commerce Clause.[5] This Court disagreed. Section 844(i), it explained, includes not only the broad phrase "affecting commerce," but also the "qualifying words 'used in' a commerce-affecting activity." 120 S. Ct. at 1909. "The key word is 'used,'" the Court concluded, and that word invokes something less than full Commerce Clause authority. *Id.* Instead, the phrase "*used in* . . any activity affecting interstate . . . commerce", 18 U.S.C. § 844(i) (emphasis added), is "most sensibly read to mean active employment for commercial purposes," rather than the more passive or indirect connection to commerce that might suffice to trigger broader Commerce Clause authority. 120 S. Ct. at 1910.

The same analysis applies to § 1 of the FAA. As in the federal arson statute, the word "commerce" does not stand alone and "unqualified." *Id.* at 1909. Instead, § 1 and § 2 of the FAA each uses a different modifier. Section 1 excludes only employment contracts of workers "*engaged in* interstate

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[5] Congress' most "far reaching" authority under the Commerce Clause is its power to regulate "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-60 (1995). Accordingly, the statutory term "affecting commerce," standing alone, normally signals an assertion of maximum Commerce Clause authority. *See Jones*, 120 S. Ct. at 1909.

commerce," while § 2 includes within the coverage of the FAA all transactions "*involving* commerce." This "broad inclusion/narrow exclusion" approach is completely consistent with the "liberal federal policy favoring arbitration agreements" advanced by the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 469 U.S. 1, 24 (1983).

In contrast to § 2's broad modifier, the § 1 qualifier "*engaged in* commerce," like the arson statute phrase "*used in* commerce," is ordinarily understood to signify some active and direct involvement in the conduct of interstate commerce. In common usage, a worker is "engaged in interstate commerce" when he is actively employed in the actual conduct of interstate commerce, and not simply when his job might have some attenuated or passive connection to interstate commerce. *Cf. United States v. American Bldg. Maint. Indus.*, 422 U.S. 271 (1975) (provider of janitorial services not "engaged in commerce" under § 7 of Clayton Act).

2. The phrase "engaged in commerce" means something less than the full set of activities subject to Commerce Clause regulation. The language of the FAA and this Court's own precedents compel such a conclusion. In construing the FAA itself, this Court in *Allied-Bruce* already has held that the § 2 term "involving commerce" is broader than "engaged in commerce," the phrase that appears in § 1. In construing § 2's language to reach to the fullest extent of Congress' Commerce Clause authority and hence to all activities substantially affecting commerce, 513 U.S. at 273-77, the Court expressly distinguished "*involving* commerce," as used in § 2, from "*in* commerce," the language of § 1. "These words ['involving commerce'] are broader than the often found words of art 'in commerce.' They therefore cover more than 'only persons or activities *within the flow* of interstate commerce.'" *Id.* at 273 (quoting *American Building*, 422 U.S. at 276) (emphasis in original). The Ninth Circuit's premise in *Craft* – that the references to

"commerce" have the same scope in the exclusionary and coverage provisions of the FAA – cannot be reconciled with this reading of the statutory text. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471-72 (D.C. Cir. 1997) (Edwards, C.J.) (construing § 1 narrowly in light of *Allied-Bruce*).

Allied-Bruce is only the most recent in a long line of this Court's cases construing the terms of art "in commerce" and "engaged in commerce" to invoke something less than full Commerce Clause authority. Indeed, many of these cases specifically contrast the phrase "engaged in commerce" with phrases of broader regulatory sweep such as "affecting commerce." *See, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974) (construing "engaged in commerce" under Clayton and Robinson-Patman Acts) ("in commerce" standard "differs distinctly" from jurisdictional provisions "keyed directly to effects on interstate markets," and is not satisfied "merely by showing that . . . activities affect commerce"); *American Building*, 422 U.S. at 276 (Clayton Act) ("contention that 'in commerce' should be read as if it meant 'affecting interstate commerce' [has been] emphatically rejected") (citing *FTC v. Bunte Bros.*, 312 U.S. 349 (1941)); *Russell v. United States*, 471 U.S. 858, 859 n.4 (1985) (federal arson statute) (recognizing "distinction between legislation limited to activities 'in commerce' and an assertion of . . . full Commerce Clause power so as to cover all activity substantially affecting interstate commerce"); *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943) (Fair Labor Standards Act) ("We have held that this clause ['engaged in commerce'] covered every employee in the 'channels of commerce' . . . as distiniguished from those who merely affected that commerce.") (quoting *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943)).[6]

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[6] As the Court has noted, *see McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980), Congress itself is fully aware that the terms "in commerce" and "engaged in commerce," unlike "affecting commerce," are not coextensive

The FAA § 2 coverage phrase "involving commerce" is the functional equivalent of "affecting commerce" and that phrase extends the reach of the FAA to the limits of Congress' Commerce Clause power. *Allied-Bruce*, 513 U.S. at 273-74. As this Court's cases make clear, the § 1 exclusion of employment contracts for workers "engaged in commerce" must exclude a class of contracts well short of the overall sweep of the statute as defined by the broader language of § 2.[7]

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with its Commerce Clause authority. When Congress wants to invoke its full Commerce Clause authority, it does not limit itself to language like "engaged in commerce," but instead couples it with broader language to signal its broad intent. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1994) (applicable to employees "engaged in commerce" *and* to employees engaged "in the production of goods for commerce"); Antitrust Procedural Improvements Act, 15 U.S.C. § 18 (1994) (applicable to persons "engaged in commerce" *or* "any activity affecting commerce"); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(a) (1994) (covering investment in any entity "engaged in" commerce *and* any enterprise the "activities of which affect" commerce); National Labor Relations Act, 29 U.S.C. § 158 (1994) (covering individuals employed by any person "engaged in commerce" *or* "in an industry affecting commerce"); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79a (1994) (applicable to companies "engaged in interstate commerce" *and* to companies engaged "in activities which directly affect or burden interstate commerce").

[7]This Court has identified three distinct categories of activity that Congress may regulate under its commerce power. *United States v. Lopez*, 514 U.S 549 (1995). "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect . . . persons or things in interstate commerce. . . . Finally, Congress' commerce authority includes the power to regulate those activities . . . that substantially affect interstate commerce." 514 U.S. at 558-59 (citations omitted). This third category is broader than the first two, reflecting Congress' most far reaching authority. *Id.* at 560.

3. Despite this authority, the Ninth Circuit believes that the phrase "engaged in commerce" in § 1 nevertheless should be read as broadly as Congress' Commerce Clause power, in part because the FAA was enacted, in the court's view, before the phrase became a narrower term of art. *See Craft*, 177 F.3d at 1093. This Court, however, repeatedly has construed the phrase as narrower than the full sweep of Congress's commerce power regardless of when the relevant statute was enacted -- including, notably, the Court's prior construction of the FAA itself in *Allied-Bruce*. *Supra* at 14.

Similarly, in *American Building*, the Court flatly rejected the government's argument that the term "engaged in commerce" used in § 7 of the Clayton Act, enacted in 1914, "should be interpreted to mean engaged in any activity that is subject to the constitutional power of Congress over interstate commerce." 422 U.S. at 277. In *Gulf Oil*, the Court also addressed and rejected the argument that the phrase "engaged in commerce," as it appears in both the Clayton Act of 1914 and the Robinson-Patman Act of 1936, "manifest[s] the full degree of [Congress's] commerce power." 419 U.S. at 199.

These cases demonstrate that the Ninth Circuit's premise is wrong. Even by the time the FAA was enacted in 1925, repeated decisions of this Court already had construed virtually identical statutory language to invoke less than the

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As *Lopez* makes clear, "affecting commerce" and "in commerce" do not have the same meaning for constitutional purposes, and they trigger different constitutional inquiries. *See id.* at 559-60 (inquiry into "substantiality" of effects applies only in cases involving intrastate activity affecting interstate commerce). As "in commerce" is narrower than "affecting commerce" for purposes of constitutional analysis, application of the same principle to construction of the relevant language of the FAA would support the contention that the "engaged in . . . commerce" language of FAA § 1's exclusion is narrower than the "involving commerce" language of FAA § 2's coverage provision.

full range of Congress' commerce power. These cases arose under the Federal Employers' Liability Act of 1908 ("FELA"), which at the time applied to railroad companies "engaging in [interstate] commerce," and made such companies liable to employees injured while "employed . . . in such commerce." 35 Stat. 65 (now codified at 45 U.S.C. §§ 51-60 (1994)). The Court held in 1914 that this language did not extend to the full range of Congress' Commerce Clause authority (even in the more narrow way that authority was understood at the time). *See Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 477-78 (1914). Instead, the Court held in a series of subsequent cases interpreting the FELA, the statutory language encompassed only the more limited category of workers "engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Shanks v. Del., Lackawanna, & W. R.R. Co.*, 239 U.S. 556, 558 (1916); *see B&O S.W. R.R. v. Burtch*, 263 U.S. 540, 543-44 (1924) (applying *Shanks* rule); *S. Pac. Co. v. Indus. Accident Comm'n*, 251 U.S. 259, 263 (1920) (same).[8] Presumably, when using the phrase "engaged in commerce" in § 1 of the FAA, Congress was fully aware of these earlier decisions construing FELA's very similar language to identify only a specific subcategory of workers falling within Congress' Commerce Clause authority. *See Tenney*, 207 F.2d at 453 ("In incorporating almost exactly the same phraseology [as the FELA] into the Arbitration Act of 1925

[8] In 1939, Congress decided that the FELA should sweep more broadly and amended the statute so that it applies not only to workers "employed in commerce" but also to any worker "any part of whose duties . . . shall be the furtherance of interstate or foreign commerce; or [who] in any way directly or closely and substantially, affect[s] such commerce." Act of Aug. 11, 1939, 53 Stat. 1404 (codified at 45 U.S.C. § 51 (1994)). The amendment expanding the statute's reach is itself another example of Congress' recognition that the term "in commerce" does not itself reach to the full extent of the Commerce Clause. *See supra* at Section I.A.2.

its draftsmen and the Congress which enacted it must have had in mind this current construction of the language which they used.").

In summary, contrary to the Ninth Circuit's view, § 1's exclusion of employment contracts for workers "engaged in commerce" is not coextensive with § 2's inclusion of all contracts "affecting commerce" within the coverage of the FAA. The Ninth Circuit, while acknowledging that Congress used two different phrases to modify the term "commerce" in §§ 1 and 2 of the FAA, nevertheless concluded that Congress intended their meanings to be the same. However, if that were true, then any text beyond "all contracts of employment" is surplusage.[9] Section 1 must be interpreted more narrowly in order to give meaning to all of its terms. The question here is not whether § 1 excludes only a subcategory of employment contracts from the reach of the FAA, but which subcategory the statute excludes.

B. The Phrase "Engaged in Commerce" As Used In FAA § 1 Means Engaged In The Interstate Transportation of Goods.

By its terms, the set of employment contracts excluded by § 1 are only those of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The precise scope of the last category – contracts of "workers engaged in . . . interstate commerce" – may be readily determined by reference to the language and structure of the statute itself. The reference to contracts of workers "engaged in . . . interstate commerce" does not stand alone. It follows immediately upon the identification of two other specific types of employment contracts excluded from

[9] Elsewhere, however, the Ninth Circuit cites with approval *Babbit v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995), recognizing as appropriate a reluctance to treat statutory terms as surplusage. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1193 n.13 (9th Cir.), *cert. denied*, 119 S. Ct. 445 (1998).

the statute: contracts of seamen and contracts of railroad employees. The most sensible reading of the final category is as a reference to the employment contracts of other classes of workers who are engaged in interstate commerce "*in the same way that seamen and railroad workers are.*" *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (emphasis added).

1. The rule of *ejusdem generis* provides that in construing a statute, the meaning of general terms that follow specific ones should be limited to "matters similar to those specified." *Gooch v. United States*, 297 U.S. 124, 128 (1936); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). In *Alloyd*, the Court applied a related canon of construction in interpreting § 2(10) of the Securities Act of 1933, 15 U.S.C. § 77b(10) (1994).[10] That provision defines "prospectus" as any "notice, circular, advertisement, letter, or communication, written or by radio or television" offering a security for sale. The respondent argued that a "prospectus" was, under the terms of § 2(10), any written "communication," including a private contract. This Court disagreed. The term "communication" as used in § 2(10) of

[10] The Court in *Alloyd* relied for this part of its analysis on the rule of *noscitur a sociis*, providing that "a word is known by the company it keeps." 513 U.S. at 575. Lower courts considering the § 1 exclusion generally have referred to the closely related canon of *ejusdem generis* in undertaking the same analysis. In either event, the substance of the analysis is the same. *See* Antonin Scalia, *A Matter of Interpretation: Federal Courts and The Law* 26 (1997). ("[*N*]*oscitur a sociis*[] means, literally, 'it is known by its companions.' . . . Another canon – perhaps representing only a more specific application of the last one – is *ejusdem generis*, which means 'of the same sort.' It stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using 'tacks, staples, screws, nails, rivets, and other things,' the general term 'other things' surely refers to other fasteners.").

the Securities Act, the Court emphasized, was "but one word in a list," and it could not be understood apart from that context. 513 U.S. at 574. Instead, the word "communication" took its meaning from the items that preceded it: "notice, circular, advertisement, [and] letter." Because those terms referred to documents of wide or public dissemination, the Court concluded, the term "communication" should also be understood to mean only "public communication," and hence to exclude Alloyd's private sales agreement. *Id.* at 575.

The same analysis applies to FAA § 1. Like the term "communication" in the Securities Act, "workers engaged in interstate or foreign commerce" is one part of a list. The phrase takes its meaning from the more specific examples that precede it: seamen and railroad employees. Seamen and railroad employees are alike in that they are both classes of workers "*actually engaged in the movement* of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." *Tenney*, 207 F.2d at 452-53 (emphasis added); *see also Asplundh Tree*, 71 F.3d at 598; *Cole*, 105 F.3d at 1471. Taking a cue from the specific mention of those two classes of workers, the remaining general category surely refers to those "other workers" who also are actually engaged in the movement of goods in interstate commerce.

2. This interpretation coheres not only with settled rules of statutory construction but also with the legal context in which the FAA was enacted. As noted above, the FELA statute at the time the FAA was enacted applied to railroads "engaged in commerce" and railroad workers "employed in such commerce." This Court had held well before 1925 that, even though Congress permissibly could regulate a broader range of employees, FELA's specific language reached only those railroad workers directly involved in the interstate transportation function of the railroad. *See Shanks*, 239 U.S. at 558; *supra* at 18-19. Thus, had Congress limited the

FAA's § 1 exclusion solely to "railroad employees engaged in interstate commerce," it almost certainly would have been understood as applying to only those railroad employees engaged in actual transportation functions, as the Court held in *Shanks* and its progeny. The fact that seamen and other workers "engaged in interstate commerce" also were inserted into the exclusion should not alter the analysis. What "seamen" plainly have in common with "railroad employees" is that they, too, are engaged in actual transportation functions. If the remaining class of "other workers engaged in interstate commerce" is defined consistently with the "seamen" and "railroad employees" specifically identified in the statute, then such "other workers" also must be engaged in the actual interstate transportation of goods in commerce.

3. The Ninth Circuit in *Craft* offers only one answer to the argument that FAA § 1 is limited to transportation workers: § 1 must be interpreted to be coextensive with § 2, which means that § 1 includes *all* workers of any kind that Congress could reach under the Commerce Clause. That is no answer at all. As demonstrated above, no reasonable dispute can exist that the § 1 "engaged in commerce" language covers less than the § 2 "involving commerce" language. In this particular context, the phrase "engaged in commerce" is used to refer to workers actually involved in the interstate transportation of goods. The analysis in *Craft* suggests no theory whatsoever for how the class of workers engaged in commerce might be defined if, as the case law instructs, it must be something less than all workers.

While the phrase "workers engaged in interstate . . . commerce" can be given meaning from its statutory context, the Ninth Circuit's interpretation would ignore the context altogether and simply excise the words "seamen" and "railroad employees" from FAA § 1. By its reading, the final phrase of § 1's exclusionary clause – "any other class of workers engaged in interstate . . . commerce" –

necessarily includes those specific workers along with every other worker under the reach of Congress' Commerce Clause authority. This approach ignores the well-established rule that a court, in construing any statute, should "avoid a reading which renders some words altogether redundant." *Alloyd*, 513 U.S. at 574.

If Congress had intended to exclude the employment contracts of all workers, or even all workers "engaged in interstate or foreign commerce," it could have drafted such a statute "with ease," *id.* at 575, and without the purposeless addition of "seamen" and "railroad employees." As the Fifth Circuit explained in *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (1996), "[i]t is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance." *See also Cole*, 105 F.3d at 1470; *Craft*, 177 F.3d at 1094 (Brunetti, J., dissenting); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 359 (7th Cir. 1997) (Posner, C.J.); *Asplundh Tree*, 71 F.3d at 600; *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997). The only way to give meaning to all three terms in § 1 – seamen, railroad employees, and other workers engaged in interstate commerce – is by reference to what all three have in common, i.e., direct involvement in the interstate transportation of goods.[11]

4. Respondent does not even arguably fall within this transportation worker exclusion. Respondent worked as a salesperson in a Circuit City store. He did not directly transport any goods in interstate commerce. Nor did he have

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[11] The terms "seamen" and "railroad employees" are not, of course, rendered superfluous by understanding the phrase "workers engaged in foreign or interstate commerce" to reach those workers engaged in transportation of goods in interstate commerce. As explained above, *supra* at Section I.B.1, the specific terms remain significant because, under the rule of *ejusdem generis*, they give content to the general term which follows.

any involvement, even indirect, in the transportation of goods in interstate commerce. Respondent would not be covered under any court's narrow reading of the § 1 exclusion, and neither Respondent nor the Ninth Circuit ever has suggested otherwise. Instead, Respondent can fall within the § 1 exclusion only if, as the Ninth Circuit held, § 1 excludes all employment contracts. Yet, as shown above, that all-encompassing reading cannot be reconciled with the statutory text.

A narrow reading of § 1, limiting the exclusion to workers actually involved in the movement of goods in interstate commerce, is now the rule in eleven of the federal circuits. In many of those circuits, this rule has governed for years. *See infra* at Section II.B. In none of those circuits has this reading of § 1's exclusion given rise to especially difficult or even noteworthy problems in application. *See Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 958 & n.14 (D. Md. 1994) ("The bulk of the decided cases which discuss the reach of § 1 relate to workers who were clearly not involved in a transportation industry.") (citing cases); *see also, e.g., Cole*, 105 F.3d at 1470 (parties agree that security guard does not fall within narrow understanding of § 1 exclusion); *American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987) (parties do not "seriously argue" with the proposition that postal workers in question fall within narrow understanding of § 1 exclusion).

C. The Legislative History of FAA § 1 Reveals No Clearly Expressed Legislative Intent Contrary to the Plain Meaning of the Statutory Text.

When the statutory text is clear, as in the FAA, resort to legislative history is unnecessary. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989); *see also Cole*, 105 F.3d at 1472 ("In a case such as [§ 1], where the statutory text does not admit of serious ambiguity . . .

legislative history is, at best, secondary, and, at worst, irrelevant").

In any event, a straightforward textual reading of the FAA does not lead to a result inconsistent with some "clearly expressed legislative intent." *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal quotations omitted). On the point at issue here – the scope of the § 1 exclusion – the legislative history is at best inconclusive, supporting the narrow, textual reading of the exclusion at least as strongly as Respondent's broad alternative.[12]

1. The legislative history with respect to § 1's exclusionary clause is scant and somewhat murky. The bill that became the FAA was drafted by the American Bar Association's Committee on Commerce, Trade and Commercial Law of the American Bar Association ("ABA Committee") and sponsored by the Association before Congress. *Tenney*, 207 F.2d at 452 & n.5; *Craft*, 177 F.3d at 1089 n.10. The original draft of the bill did not contain the exclusion that later became a part of § 1, *Craft*, 177 F.3d at 1089, and very little official discussion of the origin of the exclusion exists. The best indication of the impetus for the exclusion, as the Third Circuit explained in *Tenney*, appears in a report of the ABA Committee:

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[12] Several circuit courts have concluded that the sparse legislative history, on balance, reinforces the text of § 1 and supports a narrow reading of the exclusion, limited to workers directly engaged in transport of goods in interstate commerce. *See Signal-Stat Corp. v. United Elec., Radio & Mach. Workers*, 235 F.2d 298, 302 (2d Cir. 1956); *Tenney*, 207 F.2d at 452-53 (3d Cir.); *Asplundh Tree*, 71 F.3d at 601 (6th Cir.); *Pryner*, 109 F.3d at 358 (7th Cir.). Only the Ninth Circuit has taken the opposite position. This pattern of lower court precedent would be unlikely if the legislative history "clearly expressed" an intention that § 1 be read broadly. As emphasized in the brief amicus curiae filed by the Employers Group, the legislative history does not justify an expansive interpretation of the contract-of-employment exclusion.

> Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

207 F.2d at 452 (quoting 48 Am. Bar Assn. Rep. 287 (1923)).

The meager legislative history, then, "indicates that the exclusionary clause was added to overcome the objection of the seamen's union," and not for any broader purpose. *Asplundh Tree*, 71 F.3d at 601. The legislative history is not especially helpful, however, in explaining the expansion of the exclusionary clause to reach railroad workers and other transportation workers as well. Several courts have concluded that "presented with the problem of exempting seamen's contracts," *Tenney*, 207 F.2d at 452, Congress most likely noted that federal legislation already provided for arbitration of seamen's grievances and governed employment relations in the railroad industry, so that additional coverage by the FAA would be redundant and possibly confusing. *Id.*; *Asplundh Tree*, 71 F.3d at 598 (quoting *Tenney*); *Pryner*, 109 F.3d at 358; *Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Employees of Am. v. Pa. Greyhound Lines, Inc.*, 192 F.2d 310, 313 (3d Cir. 1951).[13] Conjecture abounds. The Third Circuit speculated

[13] *See* Shipping Commissioners Act of 1872, Ch. 322, 17 Stat. 262 (providing for arbitration by "Shipping Commissioners" of disputes between seamen and employers); Newlands Act, Ch. 6, 38 Stat. 103 *et seq.* (1913) (providing for mediation of disputes between railroad employees and employers); Transportation Act of 1920, Ch. 91, 41 Stat. 469 *et seq.* (establishing "Adjustment Boards" to handle grievances and disputes over working conditions in railroad industry).

that Congress then "rounded out" the exclusionary clause to cover similar transportation workers. *Tenney*, 207 F.2d at 452-53. Chief Judge Posner surmised in *Pryner* that Congress anticipated that other transportation workers, most immediately motor carriers, also would unionize and lobby successfully for protective legislation. 109 F.3d at 358. Just as likely, these additional groups of transportation workers were included simply to avoid any appearance of favoritism for selected "special interests."

The legislative history of the FAA establishes none of this conclusively. It does show, however, that § 1's employment contract exclusion was a response to a specific objection from the seamen's union about seamen's employment contracts, rather than to any broader concern. This fact by itself suggests a narrow scope for § 1. The rest is an entirely plausible account of Congress' intent, readily reconcilable with what legislative history there is and, more important, is fully consistent with the statutory text.

2. The Ninth Circuit in *Craft* offers no more enlightened or enlightening account of the legislative history for its unlikely reading of the § 1 exclusion.[14] Instead, the Ninth Circuit focuses on § 2 of the FAA and concludes that Congress never intended to bring employment disputes under the Act's coverage provision at all. The phrase "transaction involving commerce" as used in the coverage provision, according to the Ninth Circuit, "connot[es]" only "commercial deal[s] and merchant's sale[s]." 177 F.3d at 1085; *see also id.* at 1089-90 (quoting statement of ABA Committee Chair W.H.H. Piatt that FAA not intended to reach "labor disputes").

[14] The Ninth Circuit's historical analysis on this point is more fully critiqued in the amicus curiae brief of the Employers Group.

The other federal circuits have, of course, reached a different conclusion. *See, e.g., Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (creation of employment relationship is commercial "transaction" falling within terms of § 2); *Asplundh Tree*, 71 F.3d at 601 (Piatt reference to "labor disputes . . . would tend to support the contention that the Act was not intended to apply to collective bargaining agreements, but sheds no further light on the issue of individual employment contracts").

More important, this Court reached a different conclusion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Perry v. Thomas*, 482 U.S. 483 (1987). In *Gilmer*, the Court held that an employee's claim that his employer had discharged him in violation of the Age Discrimination in Employment Act could be subjected to compulsory arbitration under the FAA. *Id.*, 500 U.S. at 24-35. Though *Gilmer* did not involve a "contract of employment" within the meaning of § 1 of the FAA, *id.* at 25 n.2 (arbitration agreement in securities registration application, rather than contract with employer), it most certainly involved an employment dispute, deemed by the Court to be subject to the provisions of the FAA. Likewise, the Court held in *Perry* that an employee's claim against his employer for unpaid commissions was subject to arbitration under § 2 of the FAA, despite state law providing to the contrary. After *Gilmer* and *Perry*, the Ninth Circuit position in *Craft* – that the Act was intended "solely to bind merchants who were involved in commercial dealings," and not to reach employment disputes at all, 177 F.3d at 1089 – is simply untenable.

3. The Ninth Circuit in *Craft* also suggests that the § 1 exclusion was intended by Congress to reach to the outer limits of its Commerce Clause authority. The Ninth Circuit reasons that, in 1925, Congress believed that its Commerce Clause power was limited to "employees who actually transported people or goods in interstate commerce." *Id.* at

1087. Thus, it concludes, Congress intended the § 1 exclusion, like the § 2 coverage provision, to be coextensive with the Commerce Clause power. *Id.*

The problem with this argument is three-fold: it cannot be reconciled with the statutory language, it ignores the dynamic nature of the Commerce Clause power, and nothing in the legislative history supports it. Instead, the legislative history provides indications to the contrary. The House Judiciary Committee favorably reported the FAA in 1924 with the understanding that Congress' Commerce Clause authority was not limited to "employees who actually transported people or goods in interstate commerce," *cf. Craft*, 177 F.3d at 1087, but instead extended to all "contracts relating to interstate commerce." *See* H. R. Rep. No. 96, at 1 (1924) ("the [federal] control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce") (cited in *Allied-Bruce*, 513 U.S. at 271, for intended breadth of Act).

The House Judiciary Committee probably had in mind at least Congress' power to regulate, along with "the transportation of property," the "purchase, sale and exchange of commodities" in interstate commerce. This power was well-established in 1925 and conceded even by the Ninth Circuit elsewhere in its *Craft* opinion. *See Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (quoted in *Craft*, 177 F.3d at 1086); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921). Along with Congress' power over interstate sales came power over the employees engaged in such sales. By 1912, Congress' Commerce Clause authority was understood to extend "incidentally to every instrument and agent by which such commerce is carried on," including the employees who were "agents" of such commerce. *See In re Second Employers' Liab. Cases*, 223 U.S. 1, 47-48 (1912). The Committee also could have been relying on early indications that Congress' Commerce Clause authority might

extend even to purely *intrastate* transactions with substantial effects on interstate commerce. *See Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914) (Congress may regulate intrastate rail rates); *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 477 (1914) (Congress may regulate railroad employee injuries sustained during purely intrastate work).

Regardless, the Congress that enacted the FAA in 1925 apparently did not believe that its authority was limited to workers directly involved in the transportation of goods in interstate commerce. Moreover, the Congress that reenacted the FAA in 1947 certainly understood its authority more broadly.[15] To the extent the legislative history illuminates this point at all, it contradicts the premise of the Ninth Circuit's argument.

Finally, this Court already has held that it will not simply assume, as the Ninth Circuit did, that the pre-New Deal Congress which enacted the FAA meant the term "engaged in commerce" to reach as far as congressional power under the Commerce Clause. *See American Building*, 422 U.S. at

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[15] *Jones & Laughlin Steel* [in 1937], *Darby* [in 1941], and *Wickard* [in 1942] ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

Lopez, 514 U.S. at 556. Logically then, statutes construed by reference to the Commerce Clause necessarily must demonstrate the same elasticity and are not susceptible to an interpretation that fixes their meaning at the time of their enactment.

277-83; *Gulf Oil*, 419 U.S. at 199-201; *see also supra* at Section I.A.3. The Court is particularly skeptical of such arguments when, as in this case, courts of appeals consistently have construed "engaged in commerce" according to its ordinary and more limited meaning, and Congress has declined to clarify the matter. In *Gulf Oil*, the Court held that four decades of near-uniform appellate law reading "engaged in commerce" as different than "affecting commerce," combined with continued congressional silence, left it with no justification for extending the text of the Robinson-Patman Act beyond its "clear language." 419 U.S. at 200-01. The same is true here. Starting with *Tenney*, 207 F.2d 450 (3d Cir. 1953), the courts of appeals have with almost perfect consistency construed the § 1 exclusion narrowly, *see supra* at 11-12 n.4, without eliciting any response from Congress. *See infra* at 41. Only the clearest of legislative history could justify the conclusion that § 1 actually was intended to reach as far as the Commerce Clause – and, as discussed above, no legislative history, clear or otherwise, supports that argument.

II. THE NARROW READING OF THE FAA § 1 EXCLUSION ADOPTED BY NEARLY EVERY COURT OF APPEALS EFFECTUATES THE UNDERLYING PURPOSE OF THE FAA.

The foregoing arguments in favor of a narrow construction of the FAA § 1 exclusion are compelling standing alone. In conjunction with these arguments, however, this Court also should consider the significant practical and policy reasons supporting such a reading.

A. A Narrow Construction Of The FAA § 1 Exclusion Furthers the Liberal Federal Policy Favoring Arbitration.

In an unbroken string of decisions, this Court has recognized that by enacting the FAA, Congress articulated a liberal public policy favoring arbitration. In *Moses H. Cone*,

this Court defined that public policy as follows:

> [The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

460 U.S. at 24-25.

The following year in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court again recognized that "[i]n enacting [the FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements." *Id.* at 10. From the legislative history of the FAA, this Court gleaned a "congressional intent to place '[an] arbitration agreement . . . upon the same footing as other contracts, where it belongs.'" *Id.* at 15-16 (quoting H.R. Rep. No. 96, at 1 (1924)).

Three years later, this Court applied these precepts in support of its holding that the FAA preempted a California statute providing that wage collection actions between employers and employees may be maintained without regard to the existence of private agreements to arbitrate. *Perry v. Thomas*, 482 U.S. 483, 489 (1987). The Court construed the FAA as follows:

> Section Two . . . embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as

> exist in law or in equity for the revocation of any contract."

Id. at 489 (quoting *Keating*, 465 U.S. at 11). Moreover, this Court noted that general application of the FAA obviously was intended by Congress to be coextensive with the broad scope of the Commerce Clause:

> [The FAA is a] statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause. Its general applicability reflects that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered. . . ."

Id. at 490 (citations omitted).

As this Court repeatedly has recognized, the "basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate. The origins of those refusals apparently lie in ancient times, when the English courts fought for extension of jurisdiction – all of them being opposed to anything that would all together deprive every one of them of jurisdiction." *Allied-Bruce*, 513 U.S. at 270 (citations and internal quotation marks omitted)

This federal policy in favor of arbitration properly guides the Court's resolution of interpretive questions that arise under the FAA. In *Allied-Bruce*, the Court held that § 2 of the FAA reaches to the limits of Congress' Commerce Clause authority in part because "a broad interpretation of [§ 2's] language is consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms." 513 U.S. at 275. Likewise, in *Gilmer*, 500 U.S. at 26, the Court established at the outset that its inquiry into whether Congress had precluded arbitration of ADEA claims would be informed by the default presumption that "questions of arbitrability must be addressed with a healthy regard for the federal policy

favoring arbitration."

Section 1 of the FAA should be construed with this same "healthy regard" for the statute's underlying purpose. By reading the FAA § 1 exclusion narrowly – in accord with the statutory language and context – this Court would promote a broad application of the FAA. That approach is consistent with the liberal public policy in favor of arbitration articulated by Congress in the statute and recognized in this Court's prior decisions.

Conversely, the broad reading of the FAA § 1 exclusion, adopted by the Ninth Circuit alone, would remove from the scope of the FAA virtually all arbitration agreements between employers and employees, dramatically narrowing the effective scope of the statute. As a result, the enforceability of arbitration agreements between employers and employees may vary widely based on conflicting and inconsistent state law. An employer operating in several states and utilizing uniform procedures and a standardized arbitration agreement with its employees nationwide may find that the agreement is enforceable in some states but not in others and for same claims but not for others.[16] This anomalous result would be directly contrary to the spirit of the FAA through which Congress has evinced a desire for consistent and rigorous enforcement of arbitration agreements. *See Perry*, 482 U.S. at 490; *Allied-Bruce*, 513 U.S. at 270-71.[17]

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[16] For a discussion of the variation in state laws and the ensuing bifurcation of claims, see the brief amicus curiae of the Council for Employment Law Equity.

[17] The Ninth Circuit itself, in a case outside the employment context, recently acknowledged concern over a "patchwork in which the FAA will mean one thing in one state and something else in another." *Portland Gen. Elec. Co. v. United States Bank Trust Nat'l Ass'n.*, 2000 U.S. App. LEXIS 16498 at *19 (9th Cir. July 17, 2000) (all three judges on panel joined in concurrence stating that "the court ought to rethink the patchwork created"). At issue in *Portland* was a prior Ninth Circuit holding that courts must look to state law to define terms contained in, but not defined by, the FAA. In practice, depending upon which state's law applies, that analysis has dictated inconsistent results even when construing similar agreements under the same federal statute. The approach adopted in *Craft* would create a comparable patchwork with respect to the enforceability of arbitration agreements under state law in the employment context.

B. Application Of The FAA To Arbitration Agreements Between Employers And Employees Is Consistent With The Public Policy Favoring Arbitration Of Disputes.

1. This Court already has made clear that the broad pro-arbitration public policy articulated in the FAA fully applies to the arbitration of statutory claims between employers and employees. In *Gilmer*, this Court expressly found that employees could be required, as a condition of employment, to agree to mandatory pre-dispute arbitration of statutory discrimination claims. Although expressly declining to address the specific issue presented here (*i.e.*, the proper scope of the FAA § 1 exclusion), this Court nonetheless rejected Gilmer's arguments that arbitration of employment disputes was inherently unsatisfactory as a means of advancing the public policy behind federal anti-discrimination statutes:

> Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

The Court also rejected the argument that enforcement of agreements requiring arbitration of employment-related legal disputes somehow is "unfair" to employees, or favors employers. Rather, the Court recognized that arbitration offers all parties significant advantages over litigation:

> Although [discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce*, 513 U.S. at 280 (non-employment case; "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . .") (quoting H.R. Rep. No. 97-542, at 13 (1982)).

In *Perry*, this Court took the same approach, applying the FAA to require arbitration of disputes between employers and employees. Specifically, the Court in *Perry* permitted an employer to compel arbitration pursuant to the FAA of an employee's claims for breach of contract, conversion, civil conspiracy to commit conversion, and breach of fiduciary duty, all related to a claim for non-payment of sales commissions. *Perry*, 482 U.S. at 484-85.

Circuit City acknowledges that both *Gilmer* and *Perry* arose in a context where the arbitration agreement was contained in the securities industry registration application,

rather than in a contract of employment. However, nothing in the majority holding of either case suggests that disputes between employees and employers properly should not be subject to the federal public policy favoring arbitration. To the contrary, both cases clearly demonstrate that arbitration of such disputes is appropriate. If this Court adopts the broad reading of the FAA § 1 exclusion advanced by the Ninth Circuit, *Perry* and *Gilmer*, and specifically the analysis in *Gilmer* of arbitration of statutory employment claims, would be of little enduring practical import to arbitration agreements between employers and employees.

The suggestion that the *Gilmer* holding is limited to situations in which the agreement to arbitrate is contained in a contract between the employee and some third party (such as a securities exchange) simply cannot be reconciled with the text and spirit of the FAA. Indeed, such a holding might result in a proliferation of industry associations, or other third party entities, through which employers could require that employees execute arbitration agreements which would then be enforceable pursuant to the FAA. Such an artifice – prohibiting employers and employees from entering into FAA-enforceable arbitration agreements directly, but permitting them to do so through straw men – makes no practical sense and cannot have been envisioned by Congress in enacting the FAA.

2. Nor could such a result be reconciled with fifty years of contrary jurisprudence. In 1953, the Third Circuit first meaningfully analyzed the scope of the FAA § 1 exclusion. *See Tenney*, 207 F.2d at 450. After considering the text of the FAA as well as its legislative history, the Third Circuit found that Congress intended to limit the FAA § 1 exclusion to "the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers." *Id.* at 452-53. Following *Tenney*, every United States Court of Appeals to rule on the

subject (except the Ninth Circuit) has agreed with this analysis, permitting enforcement via the FAA of employer-employee arbitration agreements outside the transportation industries.

Since 1991, the circuit courts have been able to rely not only on *Tenney* and its progeny for this rule, but also on this Court's own decision in *Gilmer*. As Chief Judge Edwards explained in *Cole*:

> [A]lthough the decision in *Gilmer* did not reach the issue of section 1's scope . . . the majority opinion indicates that the Court would be inclined to read section 1 narrowly, as we do today . . . . As Justice Stevens's dissent suggests, *see Gilmer*, 500 U.S. at 40, if the FAA actually excluded all employment contracts from the enforcement provisions of the FAA, it would be anomalous to compel arbitration of Gilmer's employment claims simply because the arbitration agreement was not formally a part of a "contract for employment." We believe that the result reached in *Gilmer* implicitly suggests that the FAA does not exclude all contracts of employment.

105 F.3d at 1472. Reliance on *Gilmer* is particularly apt in this case. Respondent's arbitration agreement, like *Gilmer*'s, was not part of a formal "contract for employment." *See supra* at 4-5 & n.3. If that was enough to take Gilmer's agreement outside § 1 and bring it within the scope of the FAA, it should be enough here, as well.

In reliance on this case law, as well as the liberal federal policy favoring arbitration articulated in the FAA, employers and employees have for years entered into arbitration agreements between them structuring their affairs in accordance with what are reasonably perceived to be settled understandings. These agreements repeatedly have proven workable. As recognized by Justice O'Connor in her concurring opinion in *Allied-Bruce*, such widespread reliance

is important when considering issues of statutory interpretation, and has been given special emphasis when construing the FAA:

> [M]ore than ten years have passed since *Southland [Corp. v. Keating*, 465 U.S. 1 (1984)], several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation of the [FAA] in the interim. After reflection, I am persuaded by considerations of *stare decisis*, which we have said "have special force in the area of statutory interpretation, to acquiesce in today's judgment. . . . *Southland* has not proved unworkable . . . ."

513 U.S. at 283-84. Important also is the recognition by Justice O'Connor that if Congress disagrees with this Court's interpretation of the FAA, Congress surely may address the issue through statutory amendment. *Id.* at 234 ("[A]s always, 'Congress remains free to alter what we have done.'" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989))).[18]

Congress, the courts, federal agencies, and private organizations alike have recognized the advantages of using alternative dispute resolution to resolve employment controversies. The federal court system is overwhelmed by the number of employment-related lawsuits on the docket.[19] As a result, the administrative process and judicial proceedings for resolution of employment claims have

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[18] Congress took precisely such action when, in response to various decisions by this Court, including *Patterson*, it enacted the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a (1994).

[19] Stuart H. Bompey, et. al, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21 (1997) (the number of employment-related civil rights suits shot up 128% from 1991 to 1996).

become inefficient, time-consuming and costly.[20] Numerous employers in the public and private sectors have recognized these problems and have sought some means of alternative dispute resolution to lessen the burdens associated with the legal redress system.[21] Congress has endorsed the use of arbitration, among several types of alternative dispute resolution, and many federal agencies have taken initiatives in this area. Thus, Congress and the federal government recognize the advantage of using alternative dispute resolution, rather than the courthouse, to resolve workplace disputes.

Congress' approval of arbitration of employment disputes has been manifested in many ways. Two recently enacted federal nondiscrimination statutes specifically encourage the use of alternative dispute resolution to resolve employment disputes. The Americans with Disabilities Act ("ADA"), for example, encourages the use of alternative dispute resolution "where appropriate and to the extent authorized by law." 42 U.S.C. § 12212 (1994). Similarly, the Civil Rights Act of 1991, which amended the ADA and Title VII of the Civil Rights Act of 1964, provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini trials and arbitration, is encouraged to resolve

[20] *See Rosenberg v. Merrill Lynch*, 170 F.3d 1, 7-8 n. 4 (1st Cir. 1999) ("Arbitration may be far less costly than litigation and resolve disputes more quickly. Indeed, the number of employment-related cases in the courts has increased dramatically in the past two decades." (citations omitted)).

[21] For discussion of employment arbitration programs in various companies throughout the country, see the briefs by amici American Arbitration Association, Council for Employment Law Equity and Credit Suisse First Boston.

> disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, 105 Stat. 1081. Given these amendments, Congress has demonstrated that it bears no hostility to the arbitration of workplace disputes.

Even more compelling, Congress is presumed to be aware of this Court's invitation to correct by legislation any perceived judicial missteps in statutory construction.[22] *See Allied-Bruce*, 513 U.S. at 284 ("As always, 'Congress is free to alter what we have done.'"). It is also forewarned of the inferences this Court will draw from its failure to do so. *See Gulf Oil*, 419 U.S. at 200-01 (characterizing Congressional silence as approval of near-uniform appellate interpretation of the Robinson-Patman Act.). Bills have been introduced in every Congress since *Gilmer* to reverse that case's outcome and prohibit employers from compelling the arbitration of certain federal discrimination claims. *See* S. 121, 106th Congress (1999); S. 63, H.R. 983, 105th Congress (1997); S. 366, H.R. 3748, 104th Congress (1995); S. 2405, 103d Congress (1994). Yet not one of these bills ever has been reported out of committee.

Thus, broad agreement exists, and history proves, that arbitration of employer-employee disputes is enforceable, and valuable, as an alternative to litigation. Circuit City developed its DRA in reliance upon the strong and clear legislative and judicial public policy in favor of arbitration, as described by the Supreme Court in *Gilmer*, 500 U.S. at 25 (reaffirming the "liberal federal policy favoring arbitration agreements"). Circuit City has maintained its DRA in reliance upon the body of precedent recognizing the federal policy favoring the effective and efficient resolution of disputes through arbitration. A narrow reading of the FAA § 1 exclusion respects the statutory text and will continue to

[22] Indeed, Congress has accepted that invitation repeatedly. *See supra* at n.8 (FELA) and n.18 (Title VII).

effectuate that policy.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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